Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	**CC Docket No. 98-147**
Advanced Telecommunications Capability	)	
	)	

COMMENTS
OF
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION
("ACTA")

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EXECUTIVE SUMMARY

The 265 members of America's Carriers Telecommunication Association ("ACTA"), a national trade association of telecommunications service providers and related vendors, are concerned about the anti-competitive consequences of allowing incumbent local exchange carriers ("ILECs") to create advanced services affiliates that are specifically designed to avoid the resale and interconnection mandates of the Telecommunications Act of 1996.

ACTA contends that Congress did not give the Commission authority to waive Section 251 requirements for ILECs when it added Section 706 to the statute. Instead, ACTA contends that Congress intended for the Commission to implement and enforce rules that will help promote the creation of new entrants and, therefore, promote the delivery of advanced services to all Americans. Unfortunately, the Commission is proposing to take a large step backwards by further strengthening the monopolies' choke hold on the local bottleneck.

Even if Congress had given the Commission the power to do what it is attempting to do, allowing affiliates to use the assets of the ILEC makes those affiliates "successors" or "assigns" in the eyes of the law and, therefore, subject to regulation as ILECs.

Should the Commission choose to ignore the law and implement its proposals, it should adopt additional competitive safeguards that are far more stringent than what is proposed. ACTA proposes that the Commission adopt the following requirements:

- Require affiliates to file tariffs. Not only would such a requirement be sound public policy, but it's the law.

- ILEC affiliates should be regarded as dominant because they will be cloaked in the goodwill and coercive market power of the ILEC and have access to all or part of its vast arsenal of anti-competitive weapons.

- Affiliates offering interLATA services should be separate entities from affiliates offering intraLATA services. Also, the Commission should decide how it will determine whether an affiliate, or an ILEC for that matter, is offering in-region interLATA voice traffic over advanced networks, such a packet switching.

- ILEC affiliates should have to use virtual collocation, due to a lack of space in ILEC offices, before other competitors.

- The Commission should adopt a presumption that if an ILEC offers a particular collocation arrangement in one facility, such an arrangement should be presumed to be technically feasible at other LEC premises.

- ILECs should not be premitted to impede competing carriers from offering advanced services by imposing unnecessary restrictions on the type of equipment that competing carriers may collocate.

- Equipment transfers from ILECs to affiliates should not be exempt from non-discrimination requirements.

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America's Carriers Telecommunication Association ("ACTA"), by its attorneys and pursuant to the Commission's Rules, hereby submits its Comments in the above-captioned proceeding.

I. INTRODUCTION

Founded in 1985, ACTA has over 265 members consisting of telecommunications service providers and related vendors. ACTA's carrier members provide interexchange and local exchange services as well as Internet and other forms of data communications services. Many of ACTA's members are new entrants into the local arena and rely on the resale mandates of the Telecommunications Act of 1996[1] ("TA96" or "the Act") to offer services that would otherwise only be available to consumers from the local monopolies. In the absence of viable local exchange competition, these new entrants are forced to resell monopolies' services until they can complete the build-out of their own networks. Once built, these new networks are proving to be far superior to the monoploies' systems.

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[1] 47 U.S.C. §§ 151, *et seq.*

With this NPRM, the Commission is abandoning the fundamental premise of the Telecommunications Act of 1996 -- that competition will spur technological innovations to the benefit of all Americans. Instead, the Commission is attempting to pick market winners and losers by trying to pave "an optional alternative pathway for incumbent LECs" to circumvent congressionally mandated resale obligations. *See* NPRM at ¶¶ 83, 86. Rather than adhering to Congress's sensible mandate to promote new technologies by encouraging the viability of new entrants, the Commission is electing to take a large step backward by strengthening the monopolies' coercive market power. By using such illogic, perhaps the Commission is also poised to declare that telecommunications is a "natural monopoly" after all.

Furthermore, the Commission does not have the statutory authority to undertake the tasks outlined in the NPRM. However, even if the Commission had such powers, the creation of regulation-free in-region monopoly affiliates is not needed and is contrary to the public interest. The incumbent local exchange carriers ("ILECs" or "LECs") were free to offer advanced telecommunications services without having to resell them up until February of 1996, the date the Telecommunications Act of 1996 became law. They failed to do so -- not because the government had imposed regulatory disincentives, but because they faced no competitive pressures to encourage the deployment of such services. Broadband technologies, and DSL in particular, are not new inventions. In fact, such technologies have existed for decades. However, entrenched monopolies, that enjoyed government-guaranteed profits for nearly a century, had no incentives to beat the competition to the punch by offering new products to their customers because no competition existed. Now, in the face of losing market share to new entrants, the monopolies appear to have convinced the Commission that they must be made even more powerful in order to promote competition. Their quest to create alter egos costumed in a legal fiction called an "affiliate" appears disingenuous and nefarious.

Additionally, the Commission's premise, that the ILECs must be given these liberties as an incentive to roll out such services, is incorrect. Several large ILECs have already announced plans to offer broadband services without the "need" for an affiliate. Many of those six have already tariffed those services. These monopolies have responded to market pressures as envisioned by TA96. Such an ideal response does not warrant further economic micro-management by the Commission. Furthermore, not only is the Commission without the authority to implement its proposed rules, but it has offered not a scintilla of evidence justifying the need to relieve the ILECs of their Sections 251 or 271 obligations. The Commission's record is virtually silent regarding any "disincentive" inhibiting the ILECs from offering advanced services.

Nonetheless, should the Commission throw its congressional mandate and common sense to the wind by allowing the ILECs to masquerade as helpless in-region affiliates, then it must implement pro-competitive safeguards that are far more comprehensive than what is proposed.

II. ARGUMENT

A. Congress Did Not Give the Commission Authority to Implement The Proposals Outlined In the NPRM.

Section 706 of the Telecommunications Act of 1996[2] states, in pertinent part, that if the Commission determines that "advanced telecommunications capability is" not "being deployed to

[2] 47 U.S.C. § 706.

all Americans in a reasonable and timely fashion" then the Commission "shall take immediate action to accelerate deployment of such capability by *removing barriers* to infrastructure investment and by *promoting competition* in the telecommunications market." 47 U.S.C. § 706(b) (emphasis added).

Nowhere in the plain language of Section 706 did Congress give the Commission authority to amend TA96 and the Section 251 resale provisions in particular. Additionally, enhancing the market power of the local phone monopolies by allowing them to hide behind the fiction of an "affiliate" that has no resale obligations cannot logically be construed as "promoting competition" as envisioned in Section 706. The intent behind the Act was to allow new entrants to flourish, create a thriving and truly competitive telecommunications marketplace and, thus, bring innovations to the doorstep of every American. In order to achieve this goal, Congress mandated the removal of barriers to competition - barriers constructed by the monopolies. To do otherwise merely eviscerates the Act's pro-competitive premise.

Moreover, Section 251 imposes upon "each incumbent local exchange carrier" the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and . . . not to prohibit and not to impose unreasonable or discriminatory conditions . . . [on] the resale of such telecommunications service . . . ." 47 U.S.C. § 251 (c)(4)(A), (B). Congress did not provide either explicit or implicit language empowering the Commission to waive these mandates for ILECs or in-region affiliates that are in a comparable position. Therefore, any attempts by the Commission to allow ILECs to strengthen their choke hold on the local bottleneck by exempting them from the Section 251 resale requirements, regardless of their attempts to masquerade as an "affiliate," would be contrary to the plain meaning and intent of the statute and would not withstand an appeal. In short, the Commission does not have the authority to do what it is attempting to do.

B. Even If the Commission Had Congressional Authority to Waive Section 251, Which It Does Not, the Affiliates Would Be Considered Successors or Assigns of the Incumbents, Thus Subjecting Them to Regulation As LECs.

As the Commission said in the NPRM:

> [T]he Commission, under section 251(h)(2), may, by rule, treat as an incumbent a LEC (or a class or category of LECs) that occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by the incumbent LEC, and such carrier has substantially replaced an incumbent LEC.

NPRM at ¶ 91 (citations omitted). Furthermore, the Commission has held that it "will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience and necessity and the purposes of section 251." *Local Competition Order*, 11 FCC Rcd. At 16110, ¶ 1248, *citing* 47 U.S.C. § 251(h)(2).[3]

When looking at transfers of assets of any kind from ILECs to their affiliates, pragmatism and sound public policy dictate that the Commission should venture beyond the reasoning contained

[3] As recognized by the Commission in the *Local Competition Order*, Section 251 is one of the legal cornerstones of TA96. Without its interconnection and resale mandates, no avenue exists for new entrants to gain a toe hold on local markets. Allowing the ILECs to transfer assets to affiliates whose sole purpose is to be the advanced services arm of the ILEC undermines Congress's intent as manifested in Section 251.

in the *Non-Accounting Safeguards Order*[4] and look at the totality of the circumstances surrounding transfers of assets from ILECs to affiliates to determine whether such transfers make affiliates "successors or assigns" or whether the affiliates have "substantially replaced" an ILEC. *See* NPRM at ¶¶ 91, 105-110, 112-114. Examining transfers of assets on a piecemeal basis may cause the Commission to overlook the forest for the trees. That is, seemingly "minor," "de minimis," or "temporary" transfers may be part of a more comprehensive plan by the affiliate and the ILEC to cloak the affiliate in the goodwill and market power exclusively enjoyed by the ILEC. More likely than not, the affiliate would be able to acquire assets from the ILEC that competitiors would never have a prayer of touching -- even for "trial usage." *See id.* For example, the Commission queries whether the transfer of customer account information, employees, brand names and even customer proprietary network information ("CPNI") should constitute assignments sufficient to warrant the affiliate an entity that has substantially replaced the ILEC. These assets are not covered as network elements obtainable upon reasonable request from the ILEC[5], therefore, competitors will never be

[4] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 ("*Non-Accounting Safeguards Order*") (interpreting Section 251(h)(1)); Order on Recon., FCC 97-52 (rel. Feb. 19, 1997); Second Order on Recon., 12 FCC Rcd. 8653 (1997), *petition for review denied sub.nom. Bell Atlantic v. FCC*, No. 97-1432 (D.C. Cir. Dec. 23, 1997); *petition for review pending sub nom. SBC Communications v. FCC*, No. 97-1118 (D.C. Cir. filed March 6, 1997) (held in abeyance pursuant to court order issued May 7, 1997); *see also* 47 C.F.R. § 53.207.

[5] ACTA knows of no CLEC, unaffiliated with an RBOC, that is allowed to use an RBOC trademark or brand name of a common carrier service. The ILECs jealously guard such assets because of the enormous goodwill they generate among the consuming public. The Commission should have no hesitation in admitting that use of such a powerful asset as a brand name clearly enables the affiliate to substantially replace the ILEC.

able to enjoy their potential competitive advantages as they are heavily protected assets. At the same time, these assets are crucial to the success of the ILEC's ventures and, given to the "affiliate," would create an entity that is indistinguishible from the ILEC. The fiction would then be taken to a new level of absurdity: the ILEC would create an advanced services arm called an "affiliate" which would have every appearance of being the ILEC and would have the competitive advantage of using the ILEC's goodwill and other key assets to enhance its market power -- yet the "affiliate" would not have the same regulatory obligations as the ILEC.[6] Such a scenario clearly illustrates that the in-region affiliate "occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC" thus requiring the Commission to treat such affiliates as ILECs.[7] *See Local Competition Order*, 11 FCC Rcd. At 16110, ¶ 1248. To hold otherwise is simply to ignore

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[6] ACTA cannot envision a scenario where a "de minimis" transfer of an ILEC asset to an affiliate would not have the same anti-competitive effect. *See* NPRM at ¶¶ 113-114. So long as new entrants are not afforded the same "de minimis" benefits, the only end result imaginable would be anti-competitive and contrary to the intent of TA96.

[7] In this same vein, ACTA contends that the Commission must grant the petition filed by the Competitive Telecommunications Association ("CompTel") which asked the Commission to issue a declaratory ruling determining that in-region "CLEC" affiliates of certain ILECs should be treated as successors or assigns of the ILECs. *See Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association Petition on Defining Certain Incumbent LECs Affiliates As Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act*, CC Docket No. 98-39, Public Notice, 13 FCC Rcd. 6669 (1998) ("*CompTel Petition*"). ACTA disagrees with the Commission's decision to decline to address the *CompTel Petition* in this proceeding as the issues there are identical to the ones raised here. The Commission's decision on how to handle advanced services affiliates will directly affect the legalities of regulating ILEC "CLECs." *See infra*. The issues are so intertwined they are the same, therefore the Commission would be remiss in its duties to act on one but not the other.

the law and undermine the public interest.[8]

C. If the Commission Ignores the Law and Implements Rules Allowing ILEC Affiliates to Provide Advanced Services Without Having to Comply With Section 251, Then It Should Adopt Additional Competitive Safeguards That Are Far More Stringent Than What Is Proposed.

1. ILEC Affiliates Would Be Required to File Tariffs, As A Matter of Law.

If the Commission opts to ignore the letter of the law and go forward with its proposals, then ACTA contends in the alternative that it should adopt competitive safeguards that are far more stringent than what is proposed. Because the affiliates will be cloaked in the coercive market power of the ILEC and have at their disposal vast amounts of anti-competitive weaponry courtesy of the ILEC, they should be held to a high standard of behavior. Not only should affiliates be required to post rates, terms, conditions and transactions with the ILECs, but they should be required to tariff such matters as well. *See* NPRM at ¶¶ 96, 100. In fact, given their unique position as alter egos of the ILECs, they would be required to do so as a matter of law.

As it did in its *Second Report and Order ("Second R&O"), Policy and Rules Concerning*

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[8] The Commission should also take notice that the interpretations of the terms "successor" and "assign" as discussed above are similarly defined in other areas of the law. Corporate affiliates under common ownership or common control that use the same brand names, employees or other assets, and that provide similar services in the same geographic area as the controlling company, are treated as successors or assigns of that company. *See e.g. Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43-46 (1987); *see also Howard Johnson Co. v. Detroit Local Executive Bd., Hotel and Restaurant Employees and Bartenders Int'l Union, AFL-CIO*, 417 U.S. 249 (1974) ("*Howard Johnson*"). Affiliates are especially considered to be successors or assigns if they are formed with the purpose of evading legal obligations. *Howard Johnson,* 417 U.S. at 259 n.5. Such is the case here: the ILECs wish to create affiliates to avoid the statutory obligations required of ILECs under TA96. The Commission faces certain reversal on appeal should it attempt to ignore these legal realities.

the Interstate Interexchange Marketplace, CC Docket No. 96-61 (adopted October 31, 1996, and released November 22, 1996, 61 Fed. Reg. 59,340), with this NPRM, the Commission is attempting to shirk its legal responsibility to enforce a policy of mandatory tariffing as ordered by the United States Supreme Court. ACTA has been a leader in successfully arguing that the Commission is without the authority to exempt carriers from the obligation to file tariffs of their rates, terms and conditions. *See generally, Brief for Petitioner America's Carriers Telecommunication Association, America's Carriers Telecommunication Association, et al. v. Federal Communications Commission, et al.*, United States Court of Appeals for the District of Columbia Circuit, Docket No. 96-1459 (and consolidated cases). ACTA successfully achieved a stay of the Commission's most recent detariffing order and is confident it will be able to do so again should the Commission attempt to circumvent the law and exempt ILEC affiliates from such requirements.

The filed rate or tariff doctrine is a creature of the courts.[9] The purpose of the doctrine is to proscribe price discrimination. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 at 126 (1990), *quoting Arizona Grocery Co. v. Atchinson, T. & S.F.R. Co.*, 284 U.S. 370, 384 (1932)[10]. Effecting that purpose is not to be shunted aside even though it is recognized that

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[9] *See, e.g., MCI Telecommunications Corporation v. American Telephone & Telegraph Company*, 512 U.S. 218 (1994); *see also American Telephone and Telegraph Company v. Central Office Telephone*, --- U.S. ---, 118 S.Ct. 1956 (1998) ("*Central Office*").

[10] *Maislin* involved the transportation industry. Regulatory policies and precedents governing the telecommunications industry have been derived from rulings affecting the transportation industry. *See generally American Broadcasting Cos. v. FCC*, 643 F.2d. 818, 820-21 (D.C.Cir. 1980); *MCI Telecommunications Corp. v. FCC*, 917 F.2d. 30, 38 (D.C.Cir.

the "rule is undeniably strict and it obviously may work hardship in some cases, [for] it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." *Maislin*, 497 U.S. at 127. Hence, the courts have followed the path of strict and consistent adherence to the doctrine, *id.* at 128, and have consistently applied the doctrine to the telecommunications industry as they have to the transportation industry.

Section 10 of the Communications Act allows the Commission to forbear from regulation, but only if specified findings are made. Although the Commission has long held that the interexchange market has been robustly competitive for years,[11] and used that rationale to attempt to order mandatory detariffing of interexchange carriers -- much to the D.C. Circuit's disagreement -- the Commission cannot possibly suggest that the local exchange market is competitive in the slightest. Having a market place where 99% of access lines are owned by incumbents only underscores the public interest need to ensure against discriminatory behavior by monopolies by requiring tariffs. If the ILECs and the affiliates do not plan to treat each other better than they do other carriers or end users, then they should have no reasonable objection to a tariffing requirement.

Even if the Commission were to find the local exchange market competitive, its proposal in the NPRM would not succeed. The scenario of an agency seeking to deregulate based on a

1990); *American Telephone and Telegraph Company v. New York City Human Resources Administration*, 833 F.Supp. 962, 979 (S.D.N.Y. 1993).

[11] *See e.g., Motion of AT&T Corp. to Be Reclassified as a Nondominant Carrier*, Order, 11 FCC Rcd. 3271 (1995).

perceived groundswell of competitive activity is hardly new. The Supreme Court addressed a similar matter in *Maislin*. In *Maislin*, the Court was asked to determine the validity of the Interstate Commerce Commission's ("ICC") Negotiated Rates policy. The ICC concluded that "changes in the motor carrier industry 'clearly warrant a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases.'" *Maislin*, 497 U.S. at 121. The ICC "reasoned that the passage of the Motor Carrier Act, which significantly deregulated the motor carrier industry, justified the change in policy, for the new competitive atmosphere made strict application of § 10761 unnecessary to deter discrimination." *Id.*

The Supreme Court found the ICC's determination inconsistent with the Interstate Commerce Act, explaining that:

> the justification for departure from the filed tariff schedule that the ICC set forth in its Negotiated Rates policy rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular.

Id. at 130. The Court pointed out that the ICC "has permitted the very price discrimination that the Act by its terms seeks to prevent." *Id.* The Court also held that:

> Congress has not diverged from this interpretation and we decline to revisit it ourselves. *See California v. FERC*, 495 U.S. 490, 499, 110 S.Ct. 2024, 2029, 109 L.Ed.2d. 474 (1990), (recognizing the respect "**this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes**").

Id. at 131 (emphasis added). The Court found that compliance with the statutory requirement for tariffs and its prohibitions against carriers and their customers deviating from filed rates "utterly central" to the administration of the Act.

> [w]ithout [these provisions] . . . it would be monumentally difficult to enforce the requirement that rates be reasonable, and nondiscriminatory, . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates.'. . . **the policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of unfiled rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the rates are privately negotiated and never disclosed to the ICC.**

Id. at 132 (emphasis added).

Like the FCC, the ICC justified its action on new legislation deregulating the motor carrier industry to promote competition, stating "that in light of the more competitive environment, strict adherence to the filed tariff doctrine is inappropriate and unnecessary to deter discrimination today." *Maislin*, 497 U.S. at 134. Overtones of consumerism were also evident in the ICC's reasoning that "the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers." *Id.*

The Court resoundingly rejected such reasoning:

> [a]lthough the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, **it does not have the power to adopt a policy that directly conflicts with its governing statute. . . . Generalized congressional exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements. . . . harmony with the general legislative purpose is inadequate for that formidable task.**

Id. at 135 (emphasis added).

That the principles of *Maislin* apply to communications tariffs and the Commission's authority to abandon the tariffing regime was made clear by the Supreme Court in *MCI Telecommunications Corporation v. American Telephone & Telegraph Company*, 512 U.S. 218 (1994)(*"MCI I")*. Speaking for the Court, Justice Scalia wrote:

> [t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model . . . this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges: '[T]here is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.'

Id. (citations omitted).

Thus, it is clear that new legislation with deregulatory themes favoring a competitive market, without more, are not sufficient evidence of congressional authority to make basic and fundamental changes in the regulatory scheme. *See MCI I*; *Maislin*; *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); *MCI Telecommunications Corporation v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). What the FCC is attempting to do here is no different from what the ICC attempted to do in *Maislin*. The FCC's actions are equally untenable. In short, not only is the public interest well-served by requiring ILEC affiliates to tariff rates, terms and conditions to prevent discriminatory behavior, it's the law as well.

2. ILEC Affiliates Should Be Regarded As Dominant.

As discussed above, ILEC affiliates will enjoy the same market power as the ILECs themselves. The Commission should use this proceeding to declare that in-region ILEC affiliates are presumed to be dominant - regarding the jurisdictionally interstate services that they provide - unless that presumption is rebutted. Such a determination would be consistent with Commission precedent and in the public interest. *See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 20-22 (1980). Although the Commission decided in the *Regulatory Treatment Order* to deem ILEC affiliates that provide stand-alone, in-region interstate long distance services non-dominant, that order has no bearing on local affiliates' in-region services. *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142 (released Apr. 18, 1997) ("*Regulatory Treatment Order*"). The *Regulatory Treatment Order* was rooted in the rationale that in-region long distance affiliates would be new entrants into an already-mature market. *Id.* at ¶ 96. ILEC advanced services affiliates likely would provide the same services as could be offered by the ILEC. In short, the affiliate would be indistinguishable from the ILEC and, therefore, be dominant like the ILEC.[12]

Treating affiliates as dominant would help prevent anti-competitive behavior. In the NPRM, the Commission wrote extensively on ILEC treatment of affiliates, but failed to address scenarios

[12] The Commission is correct to point out that advanced services affiliates might be in a position to engage in "price squeezing" of unaffiliated information service providers. NPRM at ¶ 102. Declaring them dominant and requiring them to tariff their offerings would help eliminate this problem.

where affiliates would discriminate in favor of ILECs. *See* NPRM at ¶ 97; *see also id.* at ¶ 162. Affiliates' treatment of ILECs is potentially where most of the problems will originate. The ILECs are regulated and scrutinized. However, under the Commission's proposals, the affiliates would have nearly unbridled freedoms. The Commission has not contemplated that competitors must know whether the affiliate is giving the ILEC preferential treatment, to what extent and whether that constitutes discriminatory conduct. Under the NPRM, the ILEC is free to buy services from the affiliate at bargain basement and discriminatory prices and "resell" them as if they were their own, free from TA96 obligations. New entrants will never be able match such coercive economic power and, therefore, will have no incentive to compete. The death of competition in this regard will bring us back to pre-TA96 technological lethargy. Ultimately, consumers will suffer.[13]

3. The Commission Should Require Separate ILEC Affiliates for InterLATA and IntraLATA Service Offerings.

As discussed above, through Section 706, Congress did *not* give the Commission the power to waive other parts of TA96. Accordingly, ILEC affiliates must obey the mandates of Sections 271 and 272 when offering in-region interLATA services. In the NPRM, the Commission has not contemplated the use of packet-switching for in-region interLATA voice services. It would be impossible for the Commission to detect whether an advanced services ILEC affiliate was using

[13] As stated above, ACTA also contends that the Commission's ruling in this proceeding may determine the issues raised in the *CompTel Petition*. ACTA supports CompTel's petition and would strongly object to the Commission granting to already-existing ILEC "CLECs" the same freedoms it is contemplating giving to advanced services ILEC affiliates.

packet switching for voice services.[14] Nonetheless, the plain language of Section 272 requires the ILEC to create a separate affiliate for the provisioning of in-region interLATA services -- and only after it has met the requirements of Section 271.[15] The Commission has no discretion in this regard and must require such separations as a matter of law. But the Commission also must answer the following question: How is the Commission to monitor TCP/IP protocol services used for interLATA voice traffic? It is not possible to distinguish between data, voice or video bits under the suggested framework. This problem will prove vexing unless the Commission addresses it as soon as possible. Any safeguards imposed by the Commission, regarding this issue or others raised in the NPRM, should not have any automatic sunset period (NPRM at ¶ 99), but should expire only after a case-by-case analysis made by the Commission after affiliates have petitioned the Commission.

4. The Commission Should Adopt Pro-Competition Safeguards Regarding Collocation, And Other Issues.

If an ILEC has a shortage of collocation space in its offices, and the ILEC is forced to choose between accomodating its affiliate or competitors, then the affiliate should be the first to be forced to use virtual collocation. NPRM at ¶¶ 101, 129, 131. As stated above, the affiliate already will be

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[14] An affiliate's use of technology to circumvent the law in this manner is another public interest reason why it should be required to tariff its service offerings.

[15] ACTA argues that advanced services should not be regarded as "incidental" interLATA services falling under regulatory exemptions. NPRM at ¶ 82. No interLATA relief should be granted until the ILECs meet the 14-point checklist of Section 271 as mandated by Congress. Any exemptions must, as a matter of law, be limited to Congress's explicit language as embodied in the Act. Furthermore, many of the services outlined by the Commission as needing this "incentive," can be implemented on an intraLATA basis. The Commission and the ILECs have presented no evidence to warrant such a dramatic, dangerous and illegal change. NPRM at ¶¶ 190-95.

enjoying tremendous competitive advantages due to its relationship with the ILEC. To avoid further squeezing of the competition, the affiliates should not be given first priority on collocation space.

ACTA agrees with ALTS in its contention in its petition that the space available for physical collocation at many LEC premises is quite limited and frequently unavailable altogether. NPRM at ¶ 121. ACTA agrees that the Commission should adopt additional collocation rules to ensure that competing providers have access to physical collocation space so that they are able to provide advanced services using their equipment. The Commission should adopt a presumption that if an ILEC offers a particular collocation arrangement in one facility, such a collocation arrangement should be presumed to be technically feasible at other LEC premises. NPRM at ¶ 139. To hold otherwise will only lay at the feet of the ILEC the temptation to "change the rules" on a case-by-case basis to the detriment of competitors.

ACTA also agrees with the Commission's tentative conclusion that an ILEC that denies a request for physical collocation due to space limitations should not only continue to provide the state commission with detailed floor plans, but should also allow any competing provider that is seeking physical collocation at the LEC's premises to tour the premises. NPRM at ¶ 146. Both carriers then would have the right to have their grievances heard by the state commission.

ACTA also subscribes to the Commission's tentative conclusion that ILECs should not be permitted to impede competing carriers from offering advanced services by imposing unnecessary restrictions on the type of equipment that competing carriers may collocate. NPRM at ¶ 129. ILECs should also be required to allow new entrants to collocate equipment that is used for interconnection and access to unbundled network elements even if such equipment also includes switching functionalities. Not only would such a policy be pro-competition, but it would also encourage innovation. Similarly, ACTA is concerned that the Commission is laying the groundwork for picking and choosing technologies rather than letting the free market decide which innovation is more powerful and efficient. NPRM at ¶ 130. Accordingly, the Commission should not differentiate between circuit switched equipment or packet switched equipment when issuing new collocation rules. Carriers should be free to make such business decisions on their own without government interference.

Should the Commission allow transfers of equipment between ILECs and affiliates, which ACTA maintains it cannot without rendering the affiliates successors or assigns of the ILEC, then the transfers should not be exempt from non-discrimination requirements for any period of time. NPRM at ¶ 111. Requiring incumbents to offer such equipment to any entity reasonably requesting it is the entire point behind Section 251 and is the linchpin of the entire Act. Such a policy against discrimination, as mandated by Congress, would enhance competition and, therefore, stimulate innovation and broaden consumer choice.

ACTA believes that the states should not, and cannot, be preempted in their regulation of advanced services that are exclusively intrastate in nature. NPRM at ¶ 116. The test for federal regulation of these services should be "for what purpose is the service being offered?" Is it offered for jurisdictionally interstate data, video or voice service? To that extent it is interstate in nature and should be regulated by the Federal Communications Commission accordingly. If it is offered for local data, voice, video or Internet usage, then it should be deemed local traffic and regulated by the state accordingly. *See* NPRM at n. 211.

ACTA agrees with the FCC's tentative conclusion in Paragraph 189 of the NPRM that suggests that advanced services marketed by ILECs should be subject to the Section 251(c)(4) resale obligation. However, ACTA asks the Commission to clarify whether or not this reasoning undercuts the Commission's own assertions made earlier in the NPRM that subjecting advanced services to any kind of resale requirement would undermine technological advances?

III. CONCLUSION

For the reasons stated above, ACTA respectfully requests the Commission to reject requests allowing the creation of virtually unregulated ILEC affiliates, or, in the alternative, ensure that such affiliates cannot be used by ILECs as anti-competitive tools by putting in place competitive safeguards.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert M. McDowell, do hereby certify that on this 25th day of September, 1998, I have served a copy of the following document via messenger to the following:

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